No. 93-180

In the Supreme Court of the United States

OCTOBER TERM, 1993

BOCA GRANDE CLUB, INC.,

Petitioner

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ARTHUR ANDERSEN & CO., COOPERS & LYBRAND, DELOITTE & TOUCHE, ERNST & YOUNG, KPMG PEAT MARWICK, AND PRICE WATERHOUSE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether — in a multi-defendant case in which some but not all defendants settle with the plaintiff — the settling defendants automatically are entitled to an order precluding nonsettling co-defendants from asserting contribution claims against them, or whether such a "bar order" is permissible only when the effect of the settlement on any verdict subsequently rendered against the nonsettling defendants is to reduce that verdict by an amount equal to what the nonsettling defendants would have been entitled to obtain in contribution.

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INTEREST OF THE AMICI CURIAE

The amici curiae are professional firms engaged in the practice of accountancy. They are the six largest firms of independent accountants in the United States, reporting, collectively, on the financial statements of more than 90 percent of those companies whose securities are publicly traded in the United States.

The Securities Act of 1933 and the Securities Exchange Act of 1934 require all public companies whose securities are registered with the Securities and Exchange Commission to

have their financial statements examined by independent public accountants. See 15 U.S.C. § 77aa (Schedule A) (25)-(27); *id.* § 78*l*(b)(1)(J)-(K). When a registrant or its officers and directors are sued under the federal securities laws, including Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, on the claim that statements issued by the registrant were fraudulent, the registrant's independent accountants frequently are joined as defendants on the basis of allegations that financial statements they audited contained material misstatements or omissions. Independent accountants are therefore almost always named as one of a group of defendants when they are sued in private actions under Section 10(b); indeed, they increasingly have been targeted by plaintiffs as a "deep pocket" in such cases. The availability of a contribution claim in suits under Section 10(b) is for that reason especially important to amici.

This Court recently reaffirmed that contribution among jointly liable defendants is available in private actions under Section 10(b). See *Musick, Peeler & Garrett* v. *Employers Insurance of Wausau*, 113 S. Ct. 2085 (1993). In the Section 10(b) context, lower courts have reached varying conclusions regarding the propriety of contribution bar orders like the one sought by petitioner in this case. Compare *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (holding that order barring contribution claims may be issued only when settlement credit equals what nonsettling defendant would be entitled to recover under contribution standard), cert. denied, 498 U.S. 890 (1990), with *TBG Inc.* v. *Bendis*, 811 F. Supp. 596, 602-604 (D. Kan. 1992) (barring contribution claims where settlement credit was limited to the amount of the settlement), appeal pending, No. 93-3130 (10th Cir.). Because the Court's decision in this admiralty case may shed light on the district courts' power to enter bar orders in private actions under federal statutes such as Section 10(b), and because amici have had considerable practical experience

with this issue in the Section 10(b) context, amici believe that their views on the question presented may be of assistance to the Court's consideration of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Whenever a plaintiff enters into a settlement with one — but not all — of the defendants in a case, two related questions invariably arise regarding the effect of the settlement upon the rights of the nonsettling co-defendants that remain. First, how will the settlement affect any judgment rendered in favor of the plaintiff and against the nonsettling defendants? Second, how will the settlement affect contribution claims that the nonsettling defendants have asserted, or might assert, against the settling defendant?

The first of these questions is now before the Court in *McDermott, Inc.* v. *AmClyde*, No. 92-1479 (to be argued Jan. 11, 1994). That case requires the Court to determine how any judgment ultimately rendered against the nonsettling defendants in an admiralty case should be reduced to take account of the settlement paid to the plaintiff. There are two basic approaches. Under the "pro tanto," or dollar-for-dollar, standard, the settlement amount is subtracted from the total liability determined at trial and the nonsettling defendants are liable for the remainder. Under the competing "proportionate credit" rule, any judgment on the plaintiff's claim against the nonsettling defendants is reduced by the share of liability allocated to the settling defendants by the trier of fact. The plaintiff may recover from nonsettling defendants only the share of the total liability allocated to those defendants.

The present case concerns the effect of a partial settlement on contribution claims among defendants in

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.3.

admiralty actions. Again there are several competing approaches. One holds that an order barring contribution claims against the settling defendant should be issued in any case in which it is requested; another that such an order is permissible only if the settlement credit is calculated by the proportionate share method; and a third that a bar order is proper if the district court holds a hearing and determines that the settlement is "fair."

Although this case and *McDermott* involve claims in admiralty, these two questions regarding the effect of partial settlements arise with great frequency in all types of litigation involving federal causes of action. Indeed, federal courts have wrestled with these issues in contexts ranging from admiralty to ERISA to CERCLA to private actions under Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.[2] Thus, while admiralty supplies the backdrop for the Court's consideration of the matter, the decision here may well have implications for litigation involving numerous claims under a wide variety of federal statutes.

In our view, the Court cannot — and should not — address the particular question in this case in a vacuum. Rather, resolution of the contribution bar issue is inextricably linked with the Court's determination of the proper settlement credit in *McDermott*. If the Court in *McDermott* endorses the proportionate credit rule, which would in effect give the nonsettling defendant precisely what it is entitled to obtain in contribution under this Court's decision in *United States* v.

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[2] See *Lumpkin* v. *Envirodyne Indus.*, 933 F.2d 449, 464 (7th Cir.) (ERISA), cert. denied, 112 S. Ct. 373 (1991); *Environmental Transp. Systems* v. *Ensco, Inc.*, 969 F.2d 503, 507-510 (7th Cir. 1991) (CERCLA); *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989) (adopting proportionate credit rule for actions under federal securities laws), cert. denied, 498 U.S. 890 (1990).

Reliable Transfer Co., 421 U.S. 397 (1975), a bar order would be permissible because the order would not trench upon the nonsettling defendant's contribution right. Indeed, a contribution action would be unnecessary in that situation because the nonsettling defendant would be assured that it would not have to pay any portion of the settling defendant's share of any ultimate judgment. If, on the other hand, the Court adopts the pro tanto credit approach, bar orders should not be permitted for several reasons.

Most fundamentally, the effect of such an order would be to allow the settling defendant to shift its liability to the nonsettling defendant, suddenly would be deprived of its right to obtain contribution for any payment to the plaintiff in excess of its own proportionate share (and, by virtue of the settlement, the nonsettling defendant would be almost certain to pay more than its share because it would have to make up any part of the settling defendant's share not covered by the settlement). There simply is no policy reason for giving the settling defendant and the plaintiff the unfettered power to increase the liability of the nonsettling defendant in this manner. Indeed, this shift of liability will thwart the policies of fairness and appropriate deterrence that the contribution remedy is designed to protect.

Proponents of this approach argue that contribution bar orders are essential because no defendant will enter into a settlement without that protection. But this Court already has recognized that "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." *Reliable Transfer*, 421 U.S. at 408. The patent unfairness that would result from barring contribution claims requires rejection of that approach. And the "compromise" solution of barring contribution upon a finding that any settlement was reached in "good faith" is untenable because that process would protect the nonsettling defendant against a shift of liability only if the district court undertook a full evidentiary hearing

regarding the parties' relative culpabilities, the possible size of the verdict, and the strengths and weaknesses of the parties' cases — in effect a miniature trial before the trial.

If contribution bar orders are necessary to the settlement process, the answer is not to sacrifice the contribution rights of the nonsettling defendants. The appropriate resolution is to adopt the proportionate credit rule, which protects the rights of all parties.

ARGUMENT

A CONTRIBUTION ACTION AGAINST A SETTLING DEFENDANT MAY BE BARRED ONLY IF THE SETTLEMENT CREDIT IS EQUAL TO WHAT THE NONSETTLING CO-DEFENDANT WOULD HAVE BEEN ENTITLED TO OBTAIN IN CONTRIBUTION

This case involves a scenario that courts frequently encounter in cases involving multiple defendants: one or more defendants settle with the plaintiff before trial and then seek a court order barring the nonsettling co-defendants from asserting a contribution claim against those that have settled.[3]

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[3] These bar orders typically state: "[a]ll claims for contribution and/or indemnity that have been, or could be, asserted against the settling parties by any party to this action are barred and the future filing of such claims is hereby enjoined." *Federal Deposit Insurance Corp.* v. *Geldermann, Inc.*, 763 F. Supp. 524, 532 (W.D. Okla. 1990). In some cases, however, settling parties propose language for the bar order that is overbroad, potentially precluding causes of action against the settling defendants other than claims for contribution or indemnity arising out of the claim that is the subject of the settlement. See, *e.g.*, *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1024 (2d Cir. 1992) (settlement conditioned on "procurement of a final judicial order 'dismissing with prejudice and equitably barring all claims that are or could be asserted, now or in the future, against any Settling Defendant by any nonsettling defendant . . . arising out of' the subject matter of the * * * litigation"). Such overbroad language could prevent a nonsettling defendant from suing a settling defendant on a claim that is not derivative of the plaintiff's action, and therefore should not be affected by the settlement between the plaintiff and the settling defendant. Accordingly, if this Court concludes that bar orders are permissible, it should instruct the lower courts to take care that the scope of such orders is carefully circumscribed — as in the order from *Geldermann* set forth above — to reach *only* contribution claims arising out of the settled claim.

The starting point in determining the circumstances in which such an order may be issued is the nature of the contribution right itself.

"Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981). Contribution is designed to ensure that the liability is fairly allocated among two or more wrongdoers.

This Court reaffirmed the general right to contribution in admiralty cases in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), observing that "admiralty doctrine of ancient lineage" required "mutual wrongdoers" to share responsibility for paying for the damage that they inflicted. *Id.* at 110. The Court found that the principle that all parties at fault must share responsibility for paying the damages is justified by both the interest in fairness — so that a plaintiff could not "force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame" — and "[t]he interests of safety," because sharing the loss will make each party "'more careful.'" *Id.* at 111 (citation omitted).

The question in this case is whether a court may issue an order eliminating one defendant's right to contribution simply

because another defendant has entered into a settlement agreement with the plaintiff. We submit that such an order is proper only if the nonsettling defendant's contribution right is protected by other means, such as the proportionate settlement credit. Otherwise, two parties with interests adverse to the nonsettling defendant — the plaintiff and the settling defendant — would be empowered to divest the nonsettling defendant of its preexisting right to contribution.[4]

A. If This Court Adopts The Proportionate Credit Rule In *McDermott, Inc.* v. *AmClyde*, Contribution Bar Orders Would Be Permissible In Every Case.

The resolution of the question in this case is quite simple if the Court adopts the proportionate credit rule in *McDermott*, as urged by the United States in that case (see 92-1479 U.S. Am. Br. at 15-18) and by petitioner here (Pet. Br. 17, 19). Because that settlement credit standard fully protects the nonsettling defendant's contribution right, issuance of an order precluding the defendant from asserting a contribution claim would not infringe the interest that the contribution right is designed to protect. Indeed, under that

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[4] This case differs somewhat from the typical situation in which the settlement occurs, and the contribution bar order is entered, in the context of the action instituted by the plaintiff. Here, the plaintiffs' admiralty claim is being litigated in state court but the contribution claim was asserted in the federal limitation action. After petitioner entered into a settlement with the plaintiffs, it received protection against contribution claims in the form of an order issued by the federal district court granting its motion for summary judgment on respondent's contribution and indemnity claims. See Pet. App. A5. That order was in substance the equivalent of a "bar order" precluding a nonsettling co-defendant from asserting contribution claims against the settling defendant. The question here is whether the district court erred in issuing that order.

regime nonsettling defendants would have no incentive to pursue a contribution claim even if a bar order were never entered.

This Court held in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), that "when two or more parties have contributed by their fault" to a maritime tort, "liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault." *Id.* at 411. Accordingly, a party that asserts a contribution claim is entitled to recover from the defendant in contribution the latter's share of the damage based upon "the comparative degree of [its] fault." *Ibid.*

Under the proportionate credit approach, the judgment against the nonsettling defendants (if any) is reduced by the settling defendant's share of the damage, calculated on the basis of the latter's comparative fault. See, *e.g.*, *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1248-1249 (5th Cir. 1979); see also *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (Section 10(b) action), cert. denied, 498 U.S. 890 (1990). The nonsettling defendants therefore receive in the form of the settlement credit the precise relief that they would be entitled to obtain in a contribution action against the settling defendant. The proportionate credit rule is thus faithful to the principles of comparative fault and, indeed, is more efficient than a system requiring the assertion of contribution claims because it eliminates the need for ancillary contribution litigation in order to accomplish fair apportionment.

Moreover, as the United States' amicus brief in *McDermott* demonstrates (at 11-28), the proportionate credit approach is justified by a number of considerations wholly apart from the contribution bar question. Most fundamentally, that approach is fair. "Settling defendants pay an amount to which they voluntarily agree. The bar on further contribution extinguishes further risk on their part.

Nonsettling defendants never pay more than they would if all parties had gone to trial. This comports with the equitable purpose of contribution." *Franklin* v. *Kaypro Corp.*, 884 F.2d at 1231.

The proportionate credit rule also best reflects the reality of the agreement between the plaintiff and the settling defendant, which absolves the settling defendant of responsibility for paying any subsequent judgment in return for a prescribed amount of compensation. The proportionate credit standard effectively holds the plaintiff to its bargain by directing the finder of fact to identify the proportion of the ultimate judgment that would have been allocated to the settling defendant and then cancelling that portion of the claim.

At the time of settlement, no party knows for sure the size of the verdict (if any) or whether it will survive subsequent judicial review. A decision to settle represents a calculation by the plaintiff that immediate receipt of a certain sum of money is worth more than the possibility of a larger payout later. See *Franklin* v. *Kaypro Corp.*, 884 F.2d at 1230 ("[s]ettlement is attractive to parties because it reduces litigation costs. Therefore, plaintiffs are willing to settle for less than they might receive if a claim were fully litigated") (footnote and citations omitted). As between the plaintiff and a nonsettling defendant, the plaintiff — who controls the final decision whether to settle or force a defendant to trial — properly bears the risk of settling for less than a defendant's proportionate share.

A pro tanto credit, on the other hand, would enable the plaintiff to gain the advantages of settlement — early and certain payment — without the usual tradeoff of a discount on the claim. That is because any discount given to the settling defendant will be made up by the nonsettling defendant. For the same reason, it shifts the entire risk of a bad settlement from the plaintiff to the nonsettling defendant. In cases

involving a single defendant, by contrast, the plaintiff's settlement necessarily *does* involve a compromise of its claim — there is no other defendant to make up the difference.

It is obvious why plaintiffs would support a system that allows them to "have their cake and eat it too," by obtaining all of the advantages of settlement payments while retaining their right to 100% compensation — and subjects joint tortfeasors to legal rules that are considerably more burdensome than those applicable to defendants that bear sole responsibility for a wrong — but there is no policy reason why courts should sanction that patently unfair result.

By shifting the risk of a low settlement to the nonsettling defendant, moreover, the pro tanto rule also encourages collusive settlements in which the plaintiff takes a small amount from one or more defendants (perhaps with the goal of financing further litigation) and proceeds against "deep pocket" defendants in an effort to recover from those defendants far more than their proportionate share. See *Franklin* v. *Kaypro Corp.*, 884 F.2d at 1230; *In re Sunrise Securities Litigation*, 698 F. Supp. 1256, 1259 (E.D. Pa. 1988). That is precisely the opposite of what contribution is designed to accomplish.

Because the proportionate credit rule protects the nonsettling defendant's contribution right in full, and most faithfully implements the policies underlying the proportionate fault rule, this Court should adopt that standard in *McDermott*.

B. If This Court Adopts The Pro Tanto Settlement Credit Rule In *McDermott*, Nonsettling Defendants Should Not Be Barred From Maintaining Contribution Actions Against Settling Defendants.

If the Court decides, contrary to our submission, to endorse the pro tanto (dollar-for-dollar) credit rule in

McDermott, it should leave nonsettling defendants free to press contribution claims against settling defendants. Precluding contribution actions would result in manifest injustice to nonsettling defendants, effectively overturning the policy of fair allocation of damages that contribution is designed to implement. Moreover, a contribution bar cannot be justified by speculation that allowing contribution claims will decrease settlements. In striking the balance between the equitable cost-sharing principles of contribution and the policy of encouraging settlements, this Court has already concluded that fair allocation is of paramount interest. See *Reliable Transfer*, 421 U.S. at 408. There is no reason for a different result here. Finally, a "good faith" settlement requirement combined with a contribution bar is not a viable compromise solution.

1. Barring Non-Settling Defendants From Obtaining Contribution From Settling Defendants Would Eviscerate The Contribution Right And Undercut The Fairness And Deterrence Principles Underlying Contribution.

A rule of contribution is in substance a decision that liability should be apportioned among defendants according to a particular standard; in admiralty cases, apportionment is based on the defendants' relative fault. Barring contribution claims will override that apportionment standard, unfairly shifting liability from the settling defendant to the nonsettling defendant.

A simple example illustrates this phenomenon. Assume an action against two defendants — A and B. A settles for $100 and the case proceeds to trial against B. The fact finder at trial finds A 60% responsible for the damage and B 40% liable; the total damages are $1,000. If contribution is permissible, B ultimately will pay only $400 of the $900 owed to the plaintiff (as long as it can collect the $500 in

contribution that it is entitled to obtain from A). If a contribution claim against A is barred because of the settlement, B must pay the entire $900 itself. *By settling with the plaintiff, A has effectively shifted $500 of liability from itself to B.* Of course many cases involve not hundreds of dollars, but potential shifts of millions of dollars of liability from the settling defendant to the nonsettling defendant. Why should the settling defendant be permitted to increase the liability of the nonsettling defendant in this manner?

Creating such a tremendous loophole in the otherwise-applicable apportionment standard is not objectionable simply because it overrides the preexisting contribution rule. Rather, the Court should reject that approach because it threatens the important policies underlying that rule. Thus, as we have discussed, the Court justified the right of contribution in the admiralty context by reference to the basic fairness of ensuring that joint tortfeasors do not pay more than their proper share of the damage. See *Cooper Stevedoring*, 417 U.S. at 111 (contribution leads to "a 'more equal distribution of justice'"); *Reliable Transfer*, 421 U.S. at 411 (goal of "'just and equitable' allocation of damages" can be "more nearly realized" by allocating damages according to relative fault); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271-272 n.30 (1979) (contribution "remedies the unjust enrichment of the concurrent tortfeasor"). "'There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.'" *Heizer Corp.* v. *Ross*, 601 F.2d 330, 333 (7th Cir. 1979) (citation omitted) (Section 10(b) claim).

The Court has also recognized that contribution is necessary to produce an efficient level of deterrence. *Cooper Stevedoring*, 417 U.S. at 111 (where two parties are at fault, contribution serves "[t]he interests of safety" by making both "'more careful'") (quoting *The Alabama*, 92 U.S. 695, 697

(1876)). See also *Great Lakes Dredge & Dock Co.* v. *Tanker Robert Watt Miller*, 957 F.2d 1575, 1582 (11th Cir.) (discussing efficient deterrent effect of contribution), cert. denied, 113 S. Ct. 484 (1992). As one commentary has observed:

> Both moral and economic advantages can be envisaged in the linking of accident costs as closely as possible to their various causes. The burden would be shared more nearly in accordance with moral responsibility, and the various actors would be subjected to economic incentives for safety that reflect the social costs of their activities more realistically than in the absence of contribution.

3 F. Harper, F. James & O. Gray, *The Law of Torts* § 10.2, at 44 (2d ed. 1986). See also Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 541 (1981) (discussing fairness and efficiency goals of contribution).

Eliminating the right of nonsettling defendants to seek contribution from settling defendants is wholly inconsistent with both basic fairness and the interest in encouraging an efficient level of deterrence. As the example above illustrates, fairness will be nonexistent because the nonsettling defendant will be forced to pay more than its fair share in virtually every case. By entering into partial settlements, the settling defendant and the plaintiff will be able to do precisely what contribution is designed to prevent — place virtually the entire burden of the loss on one of several joint tortfeasors.[5]

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[5] While the principle of joint and several liability allows the plaintiff to recover all of its damages from a single defendant, this Court's decisions in *Cooper Stevedoring* and *Reliable Transfer* were expressly intended to ameliorate substantially the impact of the plaintiff's choice by empowering defendants to utilize contribution actions to allocate responsibility for paying the judgment among all

A rule that limits a defendant's ability to achieve apportionment on the basis of relative fault also will undercut deterrence because "it would allow guiltier defendants to get off cheaply by settling first." *Donovan* v. *Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985). Indeed, even petitioner concedes (Br. 20) that a settlement bar "does run afoul of *Reliable [Transfer]* to the extent that the pro tanto setoff may be greater or less than the actual proportionate fault of the settling tortfeasor depending upon whether plaintiff made a good or bad settlement." By permitting contribution bars in this context, therefore, this Court would be endorsing a regime that will increase unfairness and lessen effective deterrence. That outcome is entirely inconsistent with the policies underlying contribution in particular and admiralty law in general.[6]

A settlement bar combined with a pro tanto credit rule would not just eviscerate the concept of apportionment according to parties' relative fault, it also would force the nonsettling defendant to reimburse the plaintiff for the settlement discount obtained by the settling defendant. As we have discussed (see pages 10-11, *supra*), the pro tanto

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defendants according to their relative fault. As we discuss in the text, permitting contribution bar orders will vitiate the positive effects of contribution.

[6] Because this Court has extensive power to "fashion[] the controlling rules" under the general maritime law (*Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963)), there is no doubt that the Court has the power to preclude the assertion of contribution claims against settling defendants if it were to determine that bar orders were appropriate in this context. In the case of statutory contribution rights, by contrast, the Court's power is much more limited and it seems unlikely that the Court could limit the exercise of a contribution right created by Congress. See, *e.g.*, 15 U.S.C. §§ 78i & 78r (provisions of the federal securities laws that include an express contribution right).

rule effectively guarantees the plaintiff the advantages of settlement but insulates it against the claim discount that invariably accompanies a settlement. If the Court determines that this result is appropriate, and adopts the pro tanto credit standard, it surely would be unjust to require the nonsettling defendant to bear the burden of repaying the settlement discount received by the settling defendant. The nonsettling defendant should be permitted to utilize its contribution right to shift the repayment obligation to the party that obtained the discount in the first place — the settling defendant.

Finally, a pro tanto settlement credit combined with a contribution bar would affirmatively encourage settlements that are unfair by design. The plaintiff would have an incentive to team up with one or more defendants, even if they are the most culpable parties, and shift the burden of the loss to remaining defendants with deeper pockets. See *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 558 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983); Uniform Contribution Against Tortfeasors Act § 4 (1955), 12 U.L.A. 99-100 (1975) (describing opportunity for collusion as the driving force behind the 1939 UCATA's allowance of contribution against settling defendants); Restatement (Second) of Torts § 886A cmt. m (1979) (observing that settlement bar opens the door to collusion between plaintiff and the settling tortfeasor).[7]

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[7] Amicus National Association of Securities and Commercial Law Attorneys ("NASCAT") asserts (Br. 12) that "[s]imple economic self interest should ensure that plaintiffs will seldom settle for an unreasonably low payment from a substantially culpable defendant." In fact, economic self-interest is far more likely to lead a plaintiff to seek the largest possible recovery from the wealthiest defendant — and the pro tanto method enables the plaintiff to do just that. See *Rufolo* v. *Midwest Marine Contractor, Inc.*, 6 F.3d 448, 459 (7th Cir. 1993) (Eisele, J., concurring) (under pro tanto rule with a settlement bar, "plaintiff would settle, fairly or unfairly, with the less affluent defendant, knowing that the deep-pocket defendant was available to pick up the tab"), petition for cert. filed, 62 U.S.L.W. 3378 (U.S. Nov. 15, 1993) (No. 93-764).

In sum, every relevant consideration weighs strongly against precluding contribution claims against settling defendants in this context.

2. A Contribution Bar Cannot Be Justified By The Need To Encourage Settlements.

Petitioner (Br. 19) and its amicus (NASCAT Br. 9-12) point to only one reason why contribution bars should be freely available under a pro tanto settlement credit regime: allowing contribution allegedly would discourage settlements. But even if that were true, the interest in encouraging settlement does not outweigh the adverse effects cataloged above.

To begin with, the settlements that would be discouraged by the continued availability of contribution are by definition partial settlements. The judicial system has a reduced interest in settlements of this sort because they do not eliminate the burden on the courts engendered by complex multi-defendant cases. Such cases still will require court time for resolution of pretrial disputes and for the trial itself.

More fundamentally, as we have discussed (see pages 13-14, *supra*), this settlement process would be extremely unfair to nonsettling defendants. As this Court observed in prescribing contribution on the basis of relative fault, "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." *Reliable Transfer*, 421 U.S. at 408. The Court in *Reliable Transfer* balanced the interests at stake and determined that a rule that effectuates the principle of fair apportionment is preferable to

one that "yields quick, though inequitable, settlements." *Ibid.* The outcome of that balance should be no different in the present context, where the interest in encouraging settlement must be weighed against "the manifest unfairness to non-settling defendants if they are not permitted to seek contribution under the pro tanto approach * * *." 92-1479, U.S. Am. Br. at 10 n.3.

Indeed, the outcome of this process would be the precise situation that contribution was designed to prevent — imposition of unfair and disproportionate liability on one of a number of joint tortfeasors. There is no reason to adopt a legal rule in this case that would return admiralty law to the very situation that this Court's decisions in *Cooper Stevedoring* and *Reliable Transfer* were designed to remedy.[8]

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[8] Amicus NASCAT suggests (Br. 5-7) that the contribution right is inferior to the plaintiff's right to full compensation and that the contribution right therefore cannot be configured in a way that would interfere with settlement. There is no support in this Court's opinions for this rigid hierarchy of rights. The Court clearly determined in *Cooper Stevedoring* and *Reliable Transfer* that contribution based on relative fault was necessary to promote the important values of fairness and deterrence. As the Court's analysis in *Reliable Transfer* demonstrates, those values can in some circumstances outweigh the interest in providing compensation to the plaintiff through the settlement process.

Indeed, if — as NASCAT appears to believe — ensuring compensation for plaintiffs and promoting settlement are the only relevant values, there is no need to stop at contribution bar orders in furthering those goals. Perhaps statute of limitations defenses should be eliminated on the ground that, like contribution, they protect only defendants and therefore must fall before the interest in compensation. Other defenses could meet the same fate. These examples are laughable because no one would suggest altering fundamental rules of litigation in order to increase the pressure to settle. But that is precisely what NASCAT suggests here —

Courts have recognized in other contexts that "our preference for settlement and accord are insufficient to justify the imposition of a decree that infringes upon the rights of third parties." *LULAC* v. *Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (en banc), petition for cert. filed, 62 U.S.L.W. 3321 (U.S. Oct. 21, 1993) (No. 93-630); see also *Martin* v. *Wilks*, 490 U.S. 755, 768 (1989). The same conclusion is appropriate here.

Although a contribution bar combined with the pro tanto approach should be rejected for the reasons discussed above, allowing contribution obviously would not be an optimal solution if it in fact would discourage settlements. But that

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overriding the contribution regime devised by this Court in *Cooper Stevedoring* and *Reliable Transfer* — and defendants' rights under that regime — in order to promote settlements.

NASCAT also attempts to justify its approach by pointing to *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), and asserting that the inherent unfairness of a pro tanto rule is justified by the principle that the plaintiff must receive a full recovery even if a nonsettling defendant ends up paying more than its proportionate share. *Edmonds*, however, provides no support for that position. As the United States discusses in detail in its amicus brief in *McDermott* (at 26-28), that was a case in which a longshoreman was injured by the negligence of his stevedore-employer and a shipowner. The Court concluded that the shipowner was required to pay all the damages assessed at trial, because the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, limited the plaintiff's recovery from his employer to statutorily-defined benefits. See 443 U.S. at 264-266, 268. In the present context there is no such statutory constraint on the plaintiff's action against any tortfeasor, and any reliance on *Edmonds* is therefore misplaced. Accord *Associated Electric Coop., Inc.* v. *Mid-America Transp. Co.*, 931 F.2d 1266, 1271 (8th Cir. 1991); *Kizer* v. *Peter Kiewit Sons' Co.*, 489 F. Supp. 835, 838-840 (N.D. Cal. 1980).

tradeoff is illusory and unnecessary, because the other alternative — the proportionate share credit rule — both promotes fairness and effective deterrence and, by permitting contribution bars, would allow defendants to terminate completely their involvement with the litigation. See *Donovan*, 752 F.2d at 1181.

3. The Objections To A Contribution Bar Cannot Be Overcome By Conditioning The Bar On A Judicial Finding That The Settlement Was Made In "Good Faith."

Some have suggested that the unfairness of a contribution bar can be mitigated by requiring a finding that a settlement was made in "good faith" before a court may issue a contribution bar. See, *e.g.*, *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1317 (7th Cir. 1992); *Miller* v. *Christopher*, 887 F.2d 902, 907 (9th Cir. 1989); Restatement (Second) of Torts § 886A cmt m (1979); NASCAT Br. 12-13. That approach is unworkable as a matter of both theory and practice.

To begin with, the "good faith" standard is extremely murky. If that test is meant to identify only instances of collusive settlements, it would not remedy the other types of unfairness inherent in the contribution bar approach, principally the shifting of liability from settling defendant to nonsettling defendant and resulting interference with the principles of fairness and appropriate deterrence.

To the extent the test is meant to determine whether the settlement is "fair" to the nonsettling defendant because it does not shift liability from the settling defendant to the nonsettling defendant, "'A good faith hearing 'means bogging down the settlement process in a miniature trial before trial.' In order to be truly efficacious, the good faith hearing would require a full evidentiary hearing on all of the parties' relative culpabilities. This would negate many of the benefits of settlement." *Franklin* v. *Kaypro Corp.*, 884 F.2d at 1230

(quoting *Donovan*, 752 F.2d at 1181). See also Adamski, *supra*, at 549-550. The court also would have to consider the possible size of the verdict, the strengths and weaknesses of the parties' cases, the risks of trial, and myriad other factors.

Simply to describe this undertaking is to demonstrate its impracticality. A district court would never be able to make the sort of precise determination necessary to cabin the discretion of the plaintiff and settling defendant and thereby effectively protect the nonsettling defendant.

Furthermore, the possibility that the district judge might be required merely to "estimate[] a range of potential liability" that would satisfy the good faith requirement (*Miller*, 887 F.2d at 907) illustrates the ineffectiveness of the "good faith" solution. While this more relaxed approach might reduce the cost of the evaluation, it also would eliminate virtually all protection for the nonsettling defendant, allowing judges to approve very low settlements that would shift large amounts of liability from the settling defendants.

The proportionate credit approach is a much more efficient way to achieve what the good faith hearing is intended to do — ensure that the nonsettling defendant's liability is not increased as a result of the deal between the plaintiff and the settling defendant. The Court should adopt the proportionate credit rule in order to provide an appropriate framework for settlements that will safeguard the rights of all participants in the settlement process.

CONCLUSION

If this Court holds in *McDermott, Inc.* v. *AmClyde*, No. 92-1479, that the settlement credit should be equal to the settling defendant's proportionate share of the liability, the judgment of the court of appeals should be reversed. Otherwise, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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